Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

DANIEL P. ROBINOWITZ,
Petitioner,

VS.

RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings, FGMC INVESTMENT CORPORATION, and SHAWMUT FIRST MORTGAGE CORPORATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1 -- CONFLICT AMONG THE CIRCUITS.

Did the Court of Appeals improperly apply D'Oench, Duhme and 28 U.S.C. § 1823(e) to deny Robinowitz's "free-standing" tort claims for fraud and breach of fiduciary duty?

QUESTION 2 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; UNSETTLED RULE OF FEDERAL LAW

Did the Court of Appeals improperly extend the protection of D'Oench, Duhme and 28 U.S.C. § 1823(e) to a failed institution's subsidiary which had been sold two years prior to the failure?

QUESTION 3 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE

Did the Court of Appeals improperly refuse to apply its own non-banking exception to D'Oench, Duhme and 28 U.S.C. § 1823(e) in this case?

QUESTION 4 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; UNSETTLED RULE OF FEDERAL LAW

Did the Court of Appeals improperly apply D'Oench, Duhme and 28 U.S.C. § 1823(e) since the books and records of the failed institution fully disclosed Robinowitz's claims at the time of the failure?

PARTIES TO THE PROCEEDING

1. Daniel P. Robinowitz.

2. Resolution Trust Corporation, as Receiver for Gibraltar Savings.

3. FGMC Investment Corporation.

4. Shawmut First Mortgage Corporation.

5. Tom Thomas of the law firm of Thomas, Sheehan & Culp, L.L.P. in Dallas, Texas.

6. Beth Ann Blackwood of the Law Offices of Beth Ann Blackwood in Dallas, Texas.

7. Peter Lovato and Lori Bellows of the law firm of Hopkins & Sutter in Dallas, Texas.

8. Bettina Lawton Alexander of the law firm of Dechert Price & Rhoads in Washington, D.C.

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OPINIONS DELIVERED IN THE CASE

This petition seeks to review the June 28, 1994 decision of the Court of Appeals for the Fifth Circuit affirming a judgment of the District Court for the Northern District of Texas, Dallas Division.[1]

STATEMENT OF JURISDICTION

Robinowitz seeks a review of the opinion of the Court of Appeals for the Fifth Circuit dated June 28, 1994.

The Fifth Circuit treated Robinowitz's Suggestion for Rehearing En Banc as a Petition for Panel Rehearing

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[1] The Fifth Circuit opinion is reported at 23 F.3d 951 (5th Cir. [Tex.]) (June 28, 1994) and is included in the Appendix as Exhibit A. The judgment of the District Court which was affirmed by the Fifth Circuit is included in the Appendix as Exhibit B.

and denied it on September 19, 1994.[2] The Suggestion for Rehearing En Banc was also denied at the same time.

This Court has jurisdiction to consider this Petition under 24 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The only federal statute involved in this case is 12 U.S.C. § 1823(e) which reads as follows:

> **(e) Agreements against interests of Corporation**
>
> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured

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[2] A copy of the Court of Appeals' September 19, 1994 Order is included in the Appendix as Exhibit C.

depository institution, shall be valid against the Corporation unless such agreement --

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

STATEMENT OF THE CASE

The Proceedings Below

Robinowitz originally sued his former partners and their parent corporations in state court in 1987

alleging that they breached fiduciary duties by fraudulently inducing him to sell them his interests in two real estate development partnerships in which three of them were the sole partners (R., V. 1: 30).[3]

The state court granted summary judgment for the Defendants, Robinowitz appealed, and the Texas appellate court remanded finding that Robinowitz had presented prima facie tort claims (R., V. 1: 81, 84, 102).[4] Shortly thereafter,

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[3] This is not a collection case brought by the RTC. There are not now, nor have there ever been, any issues in this case involving the collection or payment of promissory notes. Robinowitz's claims are free-standing tort claims arising solely from the misconduct of his partners and their controlling parent corporation.

[4] A copy of Opinion of the Court of Appeals, Fifth District of Texas at

and before trial, Gibraltar Savings was placed into receivership by the RTC. Neither Shawmut nor FGMC has ever been placed into receivership by the RTC or any other agency.

The RTC removed this case to federal court from state court under the provisions of 12 U.S.C. § 1441a(1) (Supp. 1994) (R., V. 1: 4) and later filed a motion for summary judgment claiming that D'Oench, Duhme bars Robinowitz's claims (R., V. 3: 518). Robinowitz responded that D'Oench, Duhme is not applicable for several reasons (R., V. 3: 68; V. 6: 1428; V. 7: 1471, 1632; V. 9: 2040).

In January 1993, the District Court entered a memorandum opinion, order and

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Dallas, dated March 28, 1989, is included in the Appendix as Exhibit D.

final judgment granting the motion and dismissing Robinowitz's claims (R., V. 9: 2155, 2169). Robinowitz appealed to the Court of Appeals, and the District Court's opinion was affirmed on June 28, 1994.

Pertinent Facts

Gibraltar Savings is a failed, state-chartered savings and loan association.

Shawmut is an ordinary business corporation, originally owned by Gibraltar Savings, which was sold after the Robinowitz buy-out, before suit was filed, and more than two years before Gibraltar Savings failed.

FGMC is an ordinary business corporation which was originally a subsidiary of Shawmut, and which became a

direct subsidiary of Gibraltar Savings after the Shawmut sale. It is still a subsidiary of Gibraltar Savings.

Neither Shawmut nor FGMC have ever been financial institutions or in anywise involved in the banking business. Both are commercial corporations.

* * * * *

The operative facts are generally uncontested.

Robinowitz entered into two partnerships with the Defendants in 1985 to develop a $500 million mixed-use real estate project in Metairie, Louisiana (R., V. 11: 2193, 2208; V. 12: 2586, 2600). His partners were Shawmut and FGMC, both of whom were then wholly-owned subsidiaries of Gibraltar Savings with

Shawmut being the parent of FGMC. The partnership agreements provided for joint management of the project, and the Defendants were actively involved with Robinowitz in every phase of the development.

Construction began in 1985 on a large office building, a food court, a health club, and a hotel to be funded in part by a third party (R., V. 11: 2208). After the beginning of construction, the New Orleans economy softened and the third party declined to fund its part of the hotel (R., V. 11: 2195). The Defendants agreed to supply the funding in exchange for an increased interest in the hotel.

However, Gibraltar delayed the closing of the funding arrangement and

began causing construction delays which, in turn, created critical problems with pre-leasing the office building (R., V. 11: 2196). As the problems mounted, Robinowitz saw the project crumbling before his eyes and grew frantic in his efforts to persuade his partners to live up to their agreement. The Defendants, however, ignored both Robinowitz's pleas and their contractual responsibilities.

Once they had elevated the pressure to an intolerable level, they met with Robinowitz (R., V. 11: 2196, 2535, 2536) to convince him that Gibraltar was going to firesale the project for whatever it would bring on the open market (R., V. 11: 2197, 2536). At first, Robinowitz refused to believe that Gibraltar would destroy the project with such alacrity,

but, as the pressure continued to mount and the Defendants reaffirmed their representations (R., V. 11: 2530, 2531), he finally came to believe that the project was going to be shut down. Thus, on this note, negotiations began for him to sell out to the Defendants (R., V. 11: 2198).

In the beginning, Robinowitz valued his interests at $20 million and asked for payment in that amount (R., V. 11: 2198). Gibraltar refused, delayed the negotiations, and began to further increase the pressure through a course of instructing contractors to stop work (R., V. 11: 2199, 2533, 2537), delaying progress payments, and delaying reimbursements of cash expenditures (R., V. 3: 687, Tabs A and E).

While Gibraltar was intentionally tightening the noose, Robinowitz became more and more vulnerable to attack. He soon became unable to meet operating expenses and debt service. Ultimately, he caved in and sold out for $3.5 million, far less than the value of his interests (R., V. 3: 687, Tabs A and E).

The real truth, however, was that the Defendants had intentionally put pressure on their partner and simultaneously misled him with repeated false statements. They had no intention of selling the project; they simply wanted Robinowitz out of the deal so that they could have it for themselves.[5] They

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[5] The chairman of Gibraltar's board, Herb Young, is recorded in Gibraltar minutes as having spoken of difficulties with Robinowitz and stating that Gibraltar was exploring

had no intention of shutting the project down.

Months later, in a deposition in an unrelated case, Jay Janis, a member of Gibraltar's board of directors and chairman of its executive committee, described Gibraltar's true attitude about the project as follows:

> There would be simply no reason to sell a building that was a multi-phase project and to sell the first phase specifically when the first phase was just being completed and the leasing up wasn't taking place. (Emphasis supplied.)
>
> So there was never an attempt to sell. There was an attempt to complete the entire building. There was no need to sell, no desire to sell, and furthermore there was no attempt on the part of

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opportunities to "proceed on our separate paths." (R., V. 12: 2553)

> Gibraltar basically to sell it at [the end of 1986]. (Emphasis supplied.)
>
> I believe it was always Gibraltar's intention to complete the Galleria [the project]. (Emphasis supplied.) (R., V. 12: 2766-68)

Gibraltar ultimately went public with its intent. Within days after Robinowitz sold out, its representative held a press conference and publicly stated that Gibraltar was in the project for the "long haul" (R., V. 12: 2778); that the project would "continue to expand as a miniature city of offices, retail and dining establishments and the finest executive fitness, entertainment, hotel and meeting facilities;" and that over "the next few years the Galleria plans to add three more office towers, an 800,000 square foot retail mall, and a

luxury residential tower." (R., V. 12: 2786).

Thus, in reality, the Defendants never intended to abandon the project, but rather used the false threat as a ploy which, when coupled with intentional financial pressure, forced out an unwanted partner.

Once Robinowitz learned the truth, he filed suit seeking the true value of what he had sold under false pretenses (R., V. 1: 30, 63).

ARGUMENT AND AUTHORITY

QUESTION 1 -- CONFLICT AMONG THE CIRCUITS.

Did the Court of Appeals improperly apply D'Oench, Duhme and 28 U.S.C. § 1823(e) to deny Robinowitz's "free-

standing" tort claims for fraud and breach of fiduciary duty?

* * * * *

There is a clear cut split among the Circuits as to whether or not D'Oench, Duhme and 28 U.S.C. § 1823 bar the prosecution of "free-standing" tort claims against the RTC and FDIC.

Four Circuits hold that such claims are not barred,[6] generally holding in

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[6] D.C. Circuit -- DuPont v. FDIC, 1994 WL 459933 (D.C. Cir. 1994); Sixth Circuit -- Commerce Federal Savings Bank v. FDIC, 872 F.2d 1280 (1989); Eighth Circuit -- Astrup v. Midwest Federal Savings Bank, 886 F.2d 1057 (1989) and Hanson v. FDIC, 13 F.3d 1247 (1994); Eleventh Circuit -- Vernon v. FDIC, 981 F.2d 1230 (1993) and Jones v. RTC, 7 F.3d 1006 (1993).

accordance with the Court's position as expressed in Vernon:[7]

> We simply do not think the D'Oench doctrine operates to bar free-standing tort claims that are not related to a specific asset acquired by the FDIC.

To the contrary, at least two Circuits -- the First and Fifth -- take the position that D'Oench, Duhme bars free-standing claims.[8] The Fifth Circuit's decision in this case is a good example of the contrary view:

> Robinowitz first argues that the D'Oench, Duhme doctrine and

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[7] 981 F.2d at 1233.

[8] First Circuit -- Timberland Design v. First Savings Bank for Savings, 932 F.2d 46 (1991); Fifth Circuit -- Bowen v. FDIC, 915 F.2d 1013 (1990), and Robinowitz v. Gibraltar Savings, 23 F.3d 951 (1994).

> § 1823 of FIRREA should not apply to bar his claim for breach of fiduciary duty because that claim is unrelated to a note or debt.
>
> * * * * *
>
> Robinowitz's argument that D'Oench, Duhme has no application because the suit is not related to a note or debt is therefore without merit.

The First Circuit's Timberland decision is not as explicit as the Fifth Circuit's Bowen case in that Timberland dealt with tort claims arguable arising from some sort of "secret agreement" rather than being wholly unrelated to any such arrangement as is the case in Robinowitz.[9] Most certainly, the

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[9] Several cases have avoided direct confrontation with the "free-standing" issue by managing to find some "secret agreement" appended to the tort claims.

Robinowitz decision is the furthest extension of the bar thus far in any Circuit.

The split is troublesome to the extent that the Eleventh Circuit asked this Court to speak on the issue in its Vernon opinion[10] when it wrote:

> We acknowledge there are courts that disagree with our limitation of the doctrine and perhaps the Supreme Court or Congress will shed light on the intended scope of the D'Oench decision in the near future. (Citing Bowen, Timberland, Astrup, and First State Bank.)

This case squarely presents the issue to this Court for consideration.

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[10] Supra, footnote 8, at 1234.

The Supreme Court gave birth to the D'Oench, Duhme doctrine in 1942[11] in a decision arising from a suit by the FDIC on a demand note. Forty-five years later, this Court spoke again in Langley v. FDIC,[12] another collection suit by the FDIC. The two cases taken together are the only Supreme Court cases on D'Oench, Duhme and therefore provide the ultimate guidance for interpreting the doctrine. Neither case dealt with free-standing tort claims.

In 1950, Congress enacted 12 U.S.C. § 1823(e), a much narrower counterpart to the common law doctrine.

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[11] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

[12] 484 U.S. 86, 98 L.Ed.2d 340 (1987).

In the past five years, the Courts of Appeals have been called upon by the cleanup agencies to expand D'Oench, Duhme and § 1823(e) beyond their original boundaries, and in many cases, they have done so. Yet in some cases, they have refused, and the result is a myriad of decisions articulating policy far beyond the scope of this Court's two opinions.

D'Oench, Duhme, as expressed by this Court, is a federal common law rule of equitable estoppel which precludes obligors from claiming defenses arising from secret side agreements not reflected in the records of the failed institution. The rule is based upon the "federal policy to protect [FDIC], and the public funds which it administers against misrepresentation as to the securities or

other assets in the portfolios of banks which Respondent insures or to which it makes loans."[13] The essence of the theory is that a party cannot lend himself to a scheme to mislead banking authorities and later take advantage of his own improper acts.

D'Oench is generally regarded as having three objectives. The first is to allow bank examiners to rely upon a bank's records in evaluating a failed bank's assets. Second, depositors and creditors of a failed bank who cannot protect themselves are favored over the interests of borrowers who can. Third, bank officials are provided an incentive to give mature consideration to unusual

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13 D'Oench, Duhme, supra at 457.

lending arrangements in order to prevent fraudulent transactions.

Section 1823(e), unlike D'Oench, is a statutory mandate prohibiting the use of extrinsic agreements to diminish or defeat the FDIC's interest in an asset unless those agreements meet specific requirements. The Congressional purpose, like D'Oench, is to allow examiners to rely on banks' records; but unlike D'Oench, there is no concept of estoppel arising from the borrower's conduct.

This Court has never articulated any policy which, by any stretch of the imagination, extinguishes free-standing torts, particularly claims like those asserted by Robinowitz in this case.

Robinowitz was not a borrower and certainly did not lend himself to any

scheme or arrangement to mislead bank examiners. He is a victim, not a culprit. He did nothing to prevent a full and complete evaluation of Gibraltar Savings' records by examiners and, in fact, his claims were fully spread through the files years before the examiners ever arrived at Gibraltar's door.

Nor is there any reason to superimpose the interest of depositors and creditors over Robinowitz's interests. He is, after all, a creditor not a borrower. He is one of the two classes who are supposedly protected by D'Oench from unsavory borrowers.

And last, the denial of Robinowitz's claims will provide no incentive to bank officials to give special attention to

unusual lending arrangements. He was not a borrower so there were no lending arrangements, and indeed, the persons who defrauded him were the very officials who supposedly are encouraged by D'Oench, Duhme to act honestly.

These considerations are aptly summarized in the Eleventh Circuit's Jones v. Resolution Trust Corp.[14] case when the Court said:

> Jones is not seeking to enforce any secret or unwritten "agreement," so it is difficult to see how D'Oench or § 1823(e) could apply to his claims. No one is likely to memorialize an agreement or intention to commit a tort. Nor does the commission of a tort have any bearing on the validity of an institution's assets as recorded such that the bank examiners are likely to be misled, the issue that

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[14] 7 F.3d 1006 (11th Cir. 1993).

> concerned the Supreme Court in D'Oench. Although this may seem to be an artificial distinction, it is one that appears to be compelled by the language of the statute. Moreover, as we discuss below, while it would certainly be consistent with the rest of congressional policies expressed through the FIRREA if we were to decide that the RTC...is simply not subject to the tort claims of those who deal with it, that is not what § 1823(e) says, and we think it an unwarranted extension of the language to engraft that reading upon either D'Oench or 1823(e).

Even though the issue involves a balancing of the public interest on one hand versus the rights of the individual on the other, there must be limits on the extent to which this Court will allow encroachment upon an innocent party's rights. At one end of the spectrum is the judicial attitude of safeguarding

individuals' rights as set forth by the Eleventh Circuit, and at the other end is the disregard of those rights by the Fifth Circuit.[15]

In the final analysis, free-standing tort claimants are creditors of failed institutions and should be treated as such. They are no different from landlords, negligence victims, or other similarly situated claimants. They are not borrowers. There is no valid federal policy to be served by preferring one class of creditors over another, and certainly this Court should not set forth any standard which, in its final result,

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[15] The Fifth Circuit's position is particular confusing in light of its proclamation that D'Oench is not a limitless guarantee of victory by federal banking agencies. Alexandria Associates, Ltd. v. Mitchell Co., 2 F.3d 598, 601 (5th Cir. 1993).

frees the failed institution from paying its just debts, the very evil which D'Oench, Duhme was designed to prevent.

QUESTION 2 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; UNSETTLED RULE OF FEDERAL LAW

Did the Court of Appeals improperly extend the protection of D'Oench, Duhme and 28 U.S.C. § 1823(e) to a failed institution's subsidiary which had been sold two years prior to the failure?

* * * * *

The Court of Appeals extended D'Oench, Duhme and § 1823(e) to bar Robinowitz's claims against Shawmut, a separate, non-banking corporation which had been sold by Gibraltar Savings two years before it failed. The Court's

reasoning is ostensibly that federal regulators have to rely upon a financial institution's records to determine solvency, including both parents' and subsidiaries' records. Such reliance, according to the Court, is necessary to enable regulators to persuade solvent banks to assume the accounts of the failed institutions.

This reasoning simply ignores the facts.

Here, Shawmut was sold by Gibraltar Savings to a third party two years before Gibraltar failed. Thus, neither the solvency nor the books and records of Shawmut had anything to do with the solvency of Gibraltar Savings. There was nothing for the regulators to see!

In fact, Robinowitz's claims were well known to the failed institution and readily available to the regulators. His suit had been filed almost two years before the failure, and Gibraltar Savings had dozens of pleadings as well as the Texas appellate court's decision in its records when the regulators arrived.

It is illogical at best to extend protection designed for a federally insured, banking institution to a commercial corporation which was never anything but a subsidiary, and which had been sold years before the issue of Gibraltar's solvency ever arose.

Shawmut is a purely commercial enterprise organized to compete for profit in the open market. It is not subject to bank examiners' scrutiny, its

funds are not federally insured, and it cannot be placed into receivership by federal banking authorities. It did not make loans, accept deposits, or conduct banking activities.

What then can possibly be the policy justification for arming private corporations competing against the private sector with the "superdefenses" available to failed lending institutions?

The answer is that there is none. The public policy of preserving federally insured funds in the highly regulated banking industry is wholly inapplicable to non-banking subsidiaries, particularly those which have long ago been sold to a third party.

QUESTION 3 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE

Did the Court of Appeals improperly refuse to apply its own non-banking exception to D'Oench, Duhme and 28 U.S.C. § 1823(e) in this case?

* * * * *

The Fifth Circuit held in Alexandria Associates that D'Oench, Duhme does not bar claims related to non-banking transactions, yet the panel in this case refused to apply the exception even though the facts required it.

In Alexandria Associates, non-banking subsidiaries of a financial institution sold and financed partnership interests in real estate ventures to Alexandria Associates. Alexandria

claimed that the subsidiary made various misrepresentations upon the sale of the partnership interests resulting in foreclosure of the property and the loss of its $400,000 down payment.

In holding that D'Oench, Duhme did not apply, the court stated:

> The Mitchells were engaged in the ordinary commercial sale of non-bank assets - partnership interests in real estate development ventures. These sales assuredly were non-banking transactions; banks simply do not engage in the sale of partnership interests in real estate development ventures in the ordinary course of banking business.[16]

The same reasoning applies here. In both Alexandria Associates and this case, the defendants were partners in the

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[16] 2 F.3d at 603.

development of raw land; here a multi-phase project in Metairie; in Alexandria Associates, the development of an apartment building. In both cases, there were sales of joint venture interests. Here, the Defendants were the purchasers; in Alexandria Associates, they were the sellers; otherwise, there is no difference. In both cases, the defendants' intentions were identical -- they joined with others to purchase, develop and own real estate for profit, nothing more and nothing less.

The panel refused to follow Alexandria Associates, distinguishing it ostensibly because of an alleged lending relationship with Robinowitz. There was no such relationship. Robinowitz borrowed no money, executed no loan

agreements, and executed no mortgages. He owes nothing to any of the Defendants and has never owed them anything. The only lending relationship involved was between the parties' partnerships and Gibraltar, not Robinowitz. If there was a lending relationship, it was among the Defendants as much as it was with Robinowitz.

The court's statement to the contrary is simply wrong.

The court's distinction also makes no sense because in Alexandria Associates, the non-banking subsidiary did loan money to Alexandria to purchase partnership interests. Thus, there is simply no real distinction between the two cases except for the composition of the panel which decided them.

The panel was bound to follow its own circuit's controlling precedent. Its inexplicable refusal to do so resulted in the dismissal of Robinowitz's claims, and he respectfully requests that the appellate court be instructed to apply its own precedent and reinstate the claims.

QUESTION 4 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; UNSETTLED RULE OF FEDERAL LAW

Did the Court of Appeals improperly apply D'Oench, Duhme and 28 U.S.C. § 1823(e) since the books and records of the failed institution fully disclosed Robinowitz's claims at the time of the failure?

* * * * *

In Langley,[17] this Court articulated two policy reasons behind the disclosure requirements explicit in FIRREA and implicit under the D'Oench, Duhme doctrine: (1) "to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets;" and (2) "to ensure mature consideration of unusual loan transactions, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." Robinowitz's claim meets both policy requirements.

What then did Gibraltar's books and records disclose at the time they were placed into receivership?

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[17] Supra.

Robinowitz's lawsuit was filed two years before the RTC's appointment as receiver for Gibraltar Savings on October 30, 1989. In those two years, the following had occurred: (1) summary judgment was entered in favor of Defendants on the release; (2) the issue was appealed to, and decided by, the state appellate court; (3) writ of error was denied by the Supreme Court; (4) the case was remanded back to state court for trial; (5) the Court of Appeals had written an opinion specifically discussing the release and its lack of effect on Robinowitz's claim; (6) the files contained an indemnity agreement between Shawmut and Gibraltar; (7) Shawmut had made a claim under the indemnity agreement on December 15, 1987;

(8) Gibraltar Savings acknowledged by letter that the lawsuit was covered by the indemnity agreement; (9) interrogatories and requests for production had been propounded and answered; and (10) depositions of all key witnesses had been taken.

In short, the examiners had full notice of the substance, nature, and amount of Robinowitz's claim, and thus were not prevented from accurately evaluating the failed institution's assets and liabilities.

Robinowitz in no way thwarted the second policy reason behind the disclosure requirements relating to loans because his claims have nothing to do with a loan transaction.

The court's blind application of D'Oench, Duhme is not warranted by either the language of the doctrine or the policies underlying it. The RTC has not and cannot dispute that it had full notice of Robinowitz's claim when it took over Gibraltar Savings. As this Court held in Coit Independence Joint Venture v. FSLIC,[18] where suit has already been filed against a thrift before receivership, the receiver "will receive notice of those claims when it steps into the shoes of the failed savings and loan and takes control of its assets."[19] It is hard to envision an instance in which a claim was more documented on an

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[18] 109 S.Ct. 1361 (1989).

[19] Id. at 1374-1375.

institution's books and records than Robinowitz's was in this case.

Moreover, Gibraltar's fraudulent misrepresentations are not the type of matters that are required to be recorded in regular banking records.[20] In other words, bank examiners would not expect to find fraudulent misrepresentations relating to a non-banking transaction recorded in the bank's records. To hold otherwise is disingenuous.

In summary, the Langley policies underlying the disclosure requirements have been met and exceeded in this case.

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[20] In re Geri Zahn, Inc., Federal Deposit Insurance Corporation v. Govaert, 25 F.3d 1539 (11th Cir. 1994).

CONCLUSION

The Court of Appeals both improperly applied and improperly extended D'Oench, Duhme and § 1823(e) in this case to (1) bar free-standing torts, (2) extend protection to a commercial subsidiary sold two years prior to the failure of the financial institution, (3) refuse to apply the non-banking exception, and (4) deny claims which were fully disclosed on the failed institution's books and records.

Robinowitz requests that this Court grant his Petition, and that upon final decision, the judgment of the Court of Appeals be reversed, for his costs, and for such other relief to which he may be entitled.

Respectfully submitted,

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